Date: 20090324

Docket: T-1498-08

Citation: 2009 FC 312

Ottawa, Ontario, March 24, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MONIQUE ROY

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant sought leave to appeal a decision of a Review Tribunal convened under the *Canada Pension Plan,* R.S.C. 1985, c. C-8 (the "Act") to the Pension Appeal Board. Leave was denied by a member of the Board, in a decision dated August 15, 2008. The applicant challenges the denial of leave, and requests that the leave application be remitted for redetermination by a different Board member. For the reasons that follow, this application for judicial review is dismissed.

Background

[2] Mrs. Roy is a 60 year-old woman who has a grade 11 education. Although she is trained as a hairdresser, she has worked at a variety of other jobs throughout her life, including as a janitor, waitress, and cook. She first applied for CPP disability benefits in August of 2002, alleging that she was unable to meet her job demands as a janitor on account of pain associated with osteoarthritis of the hands and her inability to grip objects. That application was refused by Human Resources Development Canada (HRDC) in November 2002, on the basis that Ms. Roy's disability was not sufficiently severe or prolonged to warrant benefits, and that she would still be able to do some type of work. Mrs. Roy did not appeal that decision.

[3] Four years later, in June 2006, Mrs. Roy filed a new application for disability benefits. In the interim she had worked only briefly, as her attempts to return to work had been unsuccessful. Her most recent period of work - at Tim Hortons - was only 30 days in length and ended on March 31, 2005. The main medical condition that she claimed prevented her from working was severe hand pain, although she also suffered from other ailments and conditions. In order to be eligible for disability benefits she had to establish that she was disabled within the meaning of subsection 42(2)(a) of the Act, which requires that a disability be both severe and prolonged. The Act defines a severe disability as one that renders a person incapable of regularly pursuing any substantially gainful employment. A disability is prolonged if it is likely to be long continued and of indefinite duration.

[4] The 2006 application was refused by HRDC in December of that year. The decision came after HRDC had, at the request of Mrs. Roy, reconsidered and confirmed an initial determination that she was not disabled within the meaning of the Act.

[5] Mrs. Roy appealed the refusal to the Office of the Commissioner of Review Tribunals. Her appeal was heard in February of 2008.

[6] In its decision, the Review Tribunal found that Mrs. Roy had made sufficient contributions to the CPP to qualify for a disability pension, if her disability struck before the end of her "Minimum Qualifying Period" (MQP) in February 2005 and was both severe and prolonged. The Tribunal then went on to review Mrs. Roy's description of her disability and its consequences. In this respect, she testified that although she wants to work and has attempted to do so, pain in her hands prevents her from cleaning or cooking. Even as a number two cook she had difficulty peeling potatoes. She stated that she did not think she could work in retail because she cannot lift anything. The Tribunal noted the medical evidence adduced in support of her claim. The earliest evidence in this regard was a 2002 diagnosis of "severe pain in thumb and hand – arthritis" and a diagnostic image from the same period revealing "some mild degenerative changes in the DIP joints second to fifth fingers," and "No evidence of inflammatory or erosive arthropathy." The Tribunal also mentioned a 2007 opinion from Dr. Murray Mitchell that Mrs. Roy would be "a prime candidate for CM joint arthroplasty of the thumbs."

[7] After reviewing the respective submissions of Mrs. Roy and the Minister, including the Minister's contention that there was a lack of medical evidence to support a finding that the disability was "severe," the Tribunal identified the issue before it as "whether it was more likely than not that Mrs. Roy has a severe and prolonged disability." It concluded in the negative, noting inconsistencies in Mrs. Roy's testimony as to whether her pain has worsened over the years or remained stable; her lack of attempts at finding alternate work; that she had not pursued surgery as an option; and her adoption of what the Tribunal described as an "I can't do it attitude".

[8] Mrs. Roy filed a timely application for Leave to Appeal and Notice of Appeal to the Board. She presented two additional medical documents in support of her application that had not been before the Tribunal. These were clinical notes covering the period from January 2000 to February 2005, and a 2008 letter from Dr. Raymond, the applicant's family doctor.

[9] By decision dated August 15, 2008, the member designated pursuant to subsection 83(2.1) of the Act denied the application for leave stating:

> "The Appellant does not appear to have an arguable case based on any evidence adduced at the hearing. There is no hard evidence or medical evidence to support her application. I agree with the assessment decision of the Tribunal. Her application is refused.

Issues

[10] The applicant submits, based on *Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612, that a review of a Pension Appeal Board member's denial of leave to appeal raises two issues:

> a whether the decision-maker has applied the right test, that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and
>
> b whether the decision-maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.

The applicant submits that the designated member of the Board erred in both respects.

Analysis

Application of the Correct Test

[11] The applicant submits that the Board member applied the wrong test. It is submitted that rather than inquiring as to whether Mrs. Roy had raised an arguable case, he effectively evaluated the merits of her application, as shown by his statement that "there is no hard evidence or medical evidence to support her application." The parties are agreed that the "application" referred to in that statement is the application for leave to appeal, not the underlying application for disability benefits.

[12] *Callihoo* stipulates that the member on a leave application is not to evaluate the merits of the application for disability benefits. It makes no sense that the member should not evaluate the merits of the leave application as that is precisely the task the member has been assigned. Thus, having agreed that the "application" to which the member is referring is the leave application, the fact that he states that there is no evidence to support her leave application is not at all indicative that the member has evaluated the underlying application for benefits. Rather, it shows that the member has

looked at the evidence submitted in support of the leave application and determined that there is no evidence to support that the application raises an arguable case. Accordingly, the member did not err, as alleged, in applying the wrong test.

Appreciation of the Facts

[13] The factual error alleged by the applicant refers to the Board member's alleged disregard for the new evidence, which it was argued supports Mrs. Roy's claim to have been disabled during the MQP.

[14] It is common ground that the decision denying leave is reviewable for reasonableness; however, the respondent submits that the decision-maker is entitled to a high degree of deference. The respondent maintains that the Board member applied the correct test ("is there an arguable case?") and that the mere existence of additional evidence which was not before the Review Tribunal did not, in and of itself, mean that leave was warranted. In the respondent's submission the new evidence added little or nothing to the material that had previously been placed before the Review Tribunal: the clinical notes filed by the applicant contain the same information that was in the reports that were before the Review Tribunal, while Dr Raymond's affirmations in his 2008 report are not supported by the medical evidence that was before the Review Tribunal. In these circumstances, says the respondent, the Board member was not required to specifically itemize the two new documents as they were not significant.

[15] In *Kerth v. Canada (Minister of Human Resources Development),* [1999] F.C.J. No. 1252, Justice Reed commented that when new evidence has been raised on an application for leave to the Pension Appeals Board, it must be asked whether that evidence raises a genuine doubt as to whether the Review Tribunal would have reached the decision it did. In this case, the Board member does not specifically reference the new evidence. The respondent says that it should be presumed that he did consider it, based on the fact that the Board itself solicited the evidence and that it arrived before the decision was rendered, and adds that the Board member was under no obligation to actually itemize the evidence he examined or to comment thereon unless there was clear and convincing evidence that pointed to a conclusion different from the one actually reached.

[16] I agree with the respondent and adopt the observation of Justice Linden of the Federal Court of Appeal in *Litke v. Canada (Minister of Human Resources and Social Development)*, 2008 FCA 366:

> "While a decision will be unreasonable if the Board ignores relevant evidence … it is clear that it does not have to mention and discuss every piece of evidence placed before it."

In this case, I agree with the respondent that the new evidence tendered by the applicant was not of such probative significance that the Board member would have been expected to specifically address why it was insufficient to raise an arguable case. The Review Tribunal and the Board had previous opinions and documents from Dr. Raymond and the new documents added nothing of significance to the record that was before the Review Tribunal. Further, as was noted by the respondent, the 2008 letter from Dr. Raymond was in some respects contrary to other evidence before the Board and appears to be more in the nature of advocacy for his patient than an objective

medical opinion. This view is supported by the fact that his most recent letter fails to mention that surgery had been recommended at one time but was not undertaken or that the applicant failed to undergo physiotherapy, which had also been recommended. He makes no mention of what her medical condition might be had either or both of these treatments been undertaken. Absent that it was reasonable for the reviewing member to conclude that there was no "hard evidence" that supported her application for leave.

[17] I am unable to conclude that the statements in the clinical notes and the 2008 letter put the medical evidence that was before the Review Tribunal in a substantially different light. The clinical notes add nothing significant to the reports of Dr. Raymond dated February 2, 2006 and July 2, 2002, in which he notes the applicant's severe hand pain, states his diagnosis of arthritis and concludes with the statement that her prognosis is poor.

[18] Dr. Raymond's 2008 letter includes a statement that the applicant has "an inflammatory condition of the joints which stops her from doing any work of any kind". This report, although dated in 2008, indicates that these conditions were present in 2005. This is to be contrasted with the evidence before the Tribunal, an x-ray from 2006 showing "no indication of erosive arthropathy, fracture, dislocation or flexion contractures" and a diagnostic image from 2002 which indicated "some mild degenerative changes in the DIP joints second to fifth fingers" and "no evidence of inflammatory or erosive arthropathy". As noted, the report of Dr. Raymond, as it fails to specifically address the previous medical evidence, is of little probative value. Accordingly, this is enough to satisfy the *Kerth* criterion. There is no genuine doubt that the Review Tribunal decision

might have been different; thus there is no arguable case. For these reasons this application is dismissed.

[19] Both parties agreed that each party would bear their own costs of this application.

<u>JUDGMENT</u>

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and

2. On the agreement of the parties, there is no order as to costs.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1498-08
STYLE OF CAUSE:	MONIQUE ROY v. MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT
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